

**IN THE SUPREME COURT OF MISSISSIPPI
NO. 2015-TS-00620**

DANIEL H. FRANK

APPELLANT

vs.

CITY OF FLOWOOD, MISSISSIPPI

APPELLEE

**APPEAL FROM THE CIRCUIT COURT OF RANKIN COUNTY,
MISSISSIPPI**

BRIEF OF APPELLEE

**GARY E. FRIEDMAN, MB #5532
JASON T. MARSH, MB #102986
H. DAVID CLARK, III, MB #104165
PHELPS DUNBAR LLP
4270 I-55 North
Jackson, Mississippi 39211-6391
Post Office Box 16114
Jackson, Mississippi 39236-6114
Telephone: 601-352-2300
Email: freidmag@phelps.com
marshj@phelps.com
clarkt@phelps.com**

**COUNSEL FOR CITY OF
FLOWOOD, MISSISSIPPI**

**ORAL ARGUMENT
NOT REQUESTED**

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. Daniel H. Frank, Appellant.
2. Louis H. Watson, Jr. and Nick Norris, counsel for Appellant.
3. City of Flowood, Mississippi, Appellee.
4. Gary E. Friedman, Jason T. Marsh and H. David Clark, III, counsel for Appellee City of Flowood, Mississippi.
5. Honorable John H. Emfinger, Rankin County Circuit Court Judge.

SO CERTIFIED, this the 28th day of September, 2015.

/s/ H. David Clark, III

H. DAVID CLARK, III

Counsel for City of Flowood, Mississippi

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PARTIES	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES	iv
STATEMENT REGARDING ORAL ARGUMENT	1
STATEMENT OF THE ISSUE.....	2
STATEMENT OF THE CASE.....	3
A. COURSE OF PROCEEDINGS BELOW	3
B. STATEMENT OF FACTS.....	4
C. SUMMARY OF THE ARGUMENT	7
STANDARD OF REVIEW	8
ARGUMENT	8
A. THE LAW	9
B. APPELLANT DID NOT REPORT ILLEGAL ACTS OF HIS EMPLOYER TO HIS EMPLOYER OR ANYONE ELSE	10
CONCLUSION	12
CERTIFICATE OF SERVICE	14

TABLE OF AUTHORITIES

	Page(s)
STATE CASES	
<i>Aetna Cas. & Sur. Co. v. Berry</i> , 669 So.2d 56 (Miss. 1996).....	8
<i>Buchanan v. Ameristar Casino Vicksburg, Inc.</i> , 852 So.2d 25 (Miss. 2003).....	7, 9, 10
<i>Decarlo v. Bonus Stores, Inc.</i> , 989 So.2d 351 (Miss. 2008).....	11
<i>Griffin v. Kemper Cnty. Sch. Dist.</i> , 909 So.2d 1139 (Miss. Ct. App. 2005).....	8
<i>Hammons v. Fleetwood Homes of Miss., Inc.</i> , 907 So.2d 357 (Miss. Ct. App. 2005).....	9
<i>Jones v. Fluor Daniel Servs. Corp.</i> , 959 So.2d 1044 (Miss. 2007).....	10
<i>Kelly v. Miss. Valley Gas Co.</i> , 397 So. 2d 874 (Miss. 1981).....	9
<i>Mantachie Natural Gas v. Miss. Valley Gas Co.</i> , 594 So.2d 1170 (Miss. 1992).....	8
<i>McArn v. Allied Bruce-Terminix Co.</i> , 626 So.2d 603 (Miss. 1993).....	7, 9, 10, 11, 12
FEDERAL STATUTES	
42 U.S.C. § 1985	3

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is unnecessary in this case. Appellant Daniel Frank's arguments on appeal are meritless. The circuit court's opinion turned on questions of law as opposed to questions of fact, and the legal arguments are adequately presented in the briefs. Therefore, there is no need for oral argument.

STATEMENT OF THE ISSUE

I. To fall under the limited exception to Mississippi's at-will employment doctrine, Appellant must have been terminated for refusing to engage in criminally-punishable illegal acts or reporting criminally-punishable illegal acts of his employer to his employer or anyone else. Appellant alleges he was terminated for complaining of illegal acts committed by a third party who was not his employer or a co-employee. Has Appellant stated a viable wrongful termination claim under Mississippi law?

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS BELOW

Appellant, Daniel Frank, brought this lawsuit in Rankin County Circuit Court alleging wrongful termination under Mississippi law against the City of Flowood, Mississippi (“City” or “Appellee”), tortious interference under Mississippi law against Melissa Laseter, and civil conspiracy under 42 U.S.C. § 1985 against both the City and Laseter. (R. at 5-10.) The case was removed to federal court where all claims except Appellant’s state-law wrongful termination were dismissed, and the case was then remanded back to circuit court. (R. at 2.)

On January 30, 2015, following the completion of discovery, the City filed its Motion for Summary Judgment and accompanying Memorandum of Law. (R. at 11-90.) On February 27, 2015, Appellant filed his response in opposition to the City’s Motion for Summary Judgment and accompanying Memorandum of Law. (R. at 91-250.) On March 4, 2015, the City filed its Reply in support of its Motion for Summary Judgment. (R. at 257-262.) On March 27, 2015, the circuit court granted the City’s Motion for Summary Judgment and dismissed Appellant’s wrongful termination claim with prejudice. (R. at 263.) Appellant’s appeal followed.

B. STATEMENT OF FACTS

Frank was hired as a police officer by the City of Flowood in 2009. (R. at 21-23.) Frank's rank was "patrolman" and his duties included patrolling the City of Flowood and responding to calls for assistance. (R. at 24-25.)

On April 24, 2012, Appellant and Officer Aaron Thomas responded to a call from dispatch for assistance regarding a two-car wreck on Highway 25 in Flowood, Mississippi. (R. at 26, 41-47.) Melissa Laseter was the operator of one of the vehicles involved in the accident. (R. at 26, 41-47.) Upon surveying the scene, Appellant detected the smell of alcohol on Laseter and noticed that Laseter appeared to be under the influence of alcohol. (R. at 26, 41-47.) Laseter refused to undergo a portable breathalyzer test and became agitated. (R. at 41-47.) As Appellant attempted to place Laseter under arrest for suspicion of driving under the influence, Laseter pulled away and swung at him, striking him with her wedding ring. (R. at 27.) Appellant took Laseter to the ground, handcuffed her, and placed her under arrest. (R. at 27.)

Laseter was transported to the Flowood Police Department and was processed and booked on the charges of DUI First Offense, Disorderly Conduct, Resisting Arrest, Assault on a Police Officer, No Proof of Insurance, and

Possession of a Schedule II Controlled Substance.¹ (R. at 41-47.) While being processed, Laseter continued to act disorderly. (R. at 27-28.) Appellant became agitated with Laseter's behavior and removed her by her arm from the chair in which she was seated, drug her across the floor, and handcuffed her to a bench. (R. at 29-31.) Appellant completed processing Laseter and secured a warrant for Laseter's blood to be drawn to test for the presence of alcohol. (R. at 31.) Laseter was transported to River Oaks Hospital for her blood to be drawn and later transported to the Rankin County Jail. (R. at 41-47.)

Thereafter, during the prosecution of Laseter's criminal charges, her attorney, Don Leland, contacted Flowood Police Chief, Johnny Dewitt, and informed Chief Dewitt of the incident that occurred between Laseter and Appellant while Laseter was being booked and processed. (R. at 50-51.) Chief Dewitt viewed the surveillance video² taken from the booking room on the night of the incident, placed Appellant on administrative leave with pay, and instructed Lieutenant Ricky McMillian to conduct an internal investigation regarding Appellant's actions during the arrest and booking of Laseter. (R. at 53, 55.)

¹ During the search of her vehicle following her arrest, officers found ADHD medication belonging to Laseter's son and Laseter did not have a prescription for the medication at the time. The prescription was later provided, resulting in this charge being remanded. (R. at 48, 76.)

² A link to the surveillance video was provided by Appellant in his brief. Although not necessarily relevant to the issues on appeal, a review of the video clearly demonstrates that Appellant's use of force in dealing with Laseter was excessive and unwarranted.

McMillian viewed the surveillance video and took statements from the officers who were present during the arrest and booking of Laseter, including Officer Ashton French, Corporal Josh Fuller, Officer Frank, Corporal Don McBee, Detective Pat McCombs, Officer Joshua Hobock, and Officer Aaron Thomas. (R. at 54-73.) Following the investigation, McMillian found that while Appellant's arrest of Laseter was proper and his charging her with assault on a law enforcement officer was a "good charge," his belittling of Laseter and use of excessive force during the booking process was unnecessary and warranted termination. (R. at 54-56.)

After receiving Lieutenant McMillian's report and recommendation that Appellant be terminated, Chief Dewitt planned to terminate Appellant. (R. at 52.) However, having been notified by Lieutenant McMillian of Chief Dewitt's plan to terminate him, Appellant resigned before he was terminated. (R. at 36, 74.)

Laseter ultimately was convicted on the charges of DUI First Offense, Resisting Arrest, and Disorderly Conduct. (R. at 75.) The charges of Assault on a Law Enforcement Officer and Possession of a Schedule II Controlled Substance were remanded upon motion by the Rankin County District Attorney's Office. (R. at 76.) Thereafter, on September 18, 2012, Appellant filed the instant lawsuit in Rankin County Circuit Court. (R. at 5-10.)

C. SUMMARY OF THE ARGUMENT

Appellant's state-law wrongful termination claim fails because his allegations, even if true, are not sufficient to state such a claim.

Appellant does not dispute that he was an at-will employee of the City of Flowood. Therefore, his employment could have been "terminated at the will of either party, whether the termination [was] for any reason or no reason at all." *Buchanan v. Ameristar Casino Vicksburg, Inc.*, 852 So.2d 25, 26 (Miss. 2003). Mississippi law recognizes only two exceptions to the state's at-will doctrine. *Id.* Those two exceptions are as follows: an employee is not barred from maintaining a suit against his employer if he was terminated for (1) refusing to participate in an illegal act, or (2) reporting illegal acts of his employer to the employer or anyone else. *Id.* (citing *McArn v. Allied Bruce-Terminix Co.*, 626 So.2d 603, 606 (Miss. 1993)).

Appellant does not allege that his employer's plan to terminate him was a result of his refusal to engage in an illegal act or his reporting of his employer's illegal acts. Rather, he alleges that he was going to be terminated because he refused to drop assault charges against a third party, Melissa Laseter, and complained of Laseter's illegal conduct. His allegations, even if true, do not give rise to a wrongful termination claim under Mississippi law. Accordingly, the trial court's award of summary judgment should be affirmed.

STANDARD OF REVIEW

The Mississippi Supreme Court and Court of Appeals employ “a de novo standard of review of a lower court's grant or denial of summary judgment and the evidence must be viewed in the light most favorable to the party against whom the motion has been made.” *Griffin v. Kemper Cnty. Sch. Dist.*, 909 So.2d 1139, 1140 (Miss. Ct. App. 2005) (internal citations omitted). As part of its review, the Court “looks at all the evidentiary matters before it - admissions in pleadings, answers to interrogatories, depositions, affidavits, etc.” *Aetna Cas. & Sur. Co. v. Berry*, 669 So.2d 56, 70 (Miss. 1996) (citing *Mantachie Natural Gas v. Miss. Valley Gas Co.*, 594 So.2d 1170, 1172 (Miss. 1992)).

ARGUMENT

To state a claim of wrongful termination under Mississippi law, Appellant must establish that he was terminated for refusing to participate in an illegal act or for reporting an illegal act of his employer to his employer or anyone else.

Appellant does not claim that he was forced to resign for refusing to participate in an illegal act or for reporting an illegal act of his employer. Instead, he claims that he was forced to resign because he reported the illegal acts of Melissa Laseter to his employer. *See* Appellant’s Br. at 6. Therefore, Appellant’s claim does not fall into either of the two recognized exceptions to Mississippi’s at-will employment doctrine, and the circuit court’s award of summary judgment

should be affirmed.

A. THE LAW

It is well-settled that Mississippi is an at-will employment state. *Buchanan v. Ameristar Casino Vicksburg, Inc.*, 852 So.2d 25, 26 (Miss. 2003). Thus, the general rule is “a contract for employment for an indefinite period may be terminated at the will of either party, whether the termination is for any reason or no reason at all.” *Id.* (citing *McArn v. Allied Bruce-Terminix Co.*, 626 So.2d 603, 606 (Miss.1993)); *see also Kelly v. Miss. Valley Gas Co.*, 397 So. 2d 874, 874-75 (Miss. 1981). Under Mississippi law, there are only two exceptions to the state’s at-will employment rule:

(1) an employee who refuses to participate in an illegal act ... shall not be barred by the common law rule of employment at will from bringing an action in tort for damages against his employer; (2) an employee who is discharged for reporting illegal acts of his employer to the employer or anyone else is not barred by the employment at will doctrine from bringing action in tort for damages against his employer.

Id. Moreover, for either of the two *McArn* exceptions to apply, “the act[] complained of [must] warrant the imposition of criminal penalties, as opposed to mere civil penalties. *See e.g., Hammons v. Fleetwood Homes of Miss., Inc.*, 907 So.2d 357, 360 (Miss. Ct. App. 2005).

In *Buchanan*, the plaintiff alleged that she was terminated from her at-will employment because she filed a workers compensation claim after being injured at

work. *Buchanan*, 852 So.2d at 26. In affirming the trial court’s dismissal of Buchanan’s claim, the Mississippi Supreme Court reiterated that the only two exceptions to the general at-will employment rule are those espoused in *McArn*. *Id.* Therefore, the court found that because “Buchanan [did] not allege that she was terminated for refusing to participate in illegal acts at the request of Ameristar or that she was terminated for reporting illegal acts performed by Ameristar . . . she is precluded by the employment at will doctrine from bringing an action for retaliatory discharge.” *Id.*

**B. APPELLANT DID NOT REPORT ILLEGAL ACTS OF HIS
EMPLOYER TO HIS EMPLOYER OR ANYONE ELSE**

As an initial matter, Appellant expressly denies that his claim falls under the “refusal to participate in illegal acts” exception to Mississippi’s at-will employment doctrine. See Appellant’s Br. at 6. His only argument presented on appeal is that his claim falls under the “reporting of illegal acts” exception to the doctrine.³

An at-will employee may pursue a wrongful termination claim if he was terminated because he “reported an illegal activity *of the employer* to the employer or to anyone else.” *Jones v. Fluor Daniel Servs. Corp.*, 959 So.2d 1044, 1047

³ Even if Appellant argued that his claim falls under the “refusal to engage in illegal acts” exception, such an argument would be meritless because the act he allegedly refused to do, drop charges against Laseter, is not an illegal act punishable by criminal penalties. To the contrary, when asked if he was ever requested to do anything illegal, Appellant responded “I don’t know about illegal.” R. at 39.

(Miss. 2007) (emphasis added) (citing the rule first announced in *McArn v. Allied Bruce-Terminix Co.*, 626 So.2d 603 (Miss.1993)). Contrary to the limited exception announced in *McArn*, Appellant seeks to base his wrongful termination claim on the fact that he reported Mrs. Laseter's criminal acts. This is fatal to his claim, as *McArn*'s limited "reporting of illegal acts" exception only applies to reports of criminal acts committed by the Appellant's employer or a co-employee. *Decarlo v. Bonus Stores, Inc.*, 989 So.2d 351, 357 (Miss. 2008).

Appellant, without citing any authority to support his position, argues that the criminally illegal acts of Mrs. Laseter "involved" the City's operations, and thus his claim falls under the "reporting of illegal acts" exception. However, while the limited exception does extend to the reporting of illegal acts that relate to the employer's business, the illegal acts must have been committed by the employer or a co-employee of Appellant. *See Decarlo*, 989 So.2d at 357. The limited exception has never been held to apply to the reporting of criminally illegal acts committed by a third party (*i.e.*, Laseter) wholly unrelated to the employer and for whom the employer has no responsibility. Further, for the exception to apply, the illegal activity reported must "have a harmful effect on the employer's business, *i.e.*, loss of corporate income." *Decarlo*, 989 So.2d at 357. Here, the illegal activity allegedly complained of by Appellant (Laseter's illegal acts) did not have a harmful effect on the City. To the contrary, Laseter was convicted on the charges

of DUI First Offense, Resisting Arrest, and Disorderly Conduct. (R. at 75.)

Perhaps realizing that his claim does not fall under the “reporting of illegal acts” exception, Appellant also argues that *McArn*’s public policy exception should be expanded to include the reporting of all illegal acts, not just illegal acts committed by the employer or a co-employee. *See* Appellant’s Br. at 7-9. To support his argument, Appellant reasons that the State of Mississippi has a clear interest in making sure that the perpetrators of illegal acts (such as Laseter) are held accountable for their acts and in protecting the public from the perpetrator’s illegal acts. *See* Appellant’s Br. at 9. However, the facts of this case prove that Appellant’s reasoning in this regard is misguided. Here, Laseter was convicted of DUI First Offense, Resisting Arrest, and Disorderly Conduct. (R. at 75.) While two of the charges against Laseter, Possession of a Controlled Substance and Assault on a Law Enforcement Officer, were remanded, the decision to remand those charges was a result of prosecutorial discretion and was made by the Rankin County District Attorney’s Office, not the City of Flowood. (R. at 76.)

CONCLUSION

The circuit court reached the right result in this case. Appellant’s claim that he was terminated for reporting illegal acts of Laseter, even if true, does not state a viable wrongful termination claim under Mississippi law. For the reasons explained above, this Court should affirm the circuit court’s ruling.

RESPECTFULLY SUBMITTED, this the 28th day of September, 2015.

CITY OF FLOWOOD, MISSISSIPPI

BY: */s/ H. David Clark, III*

GARY E. FRIEDMAN, MB #5532
JASON T. MARSH, MB #102986
H. DAVID CLARK, III, MB #104165
PHELPS DUNBAR LLP
4270 I-55 North
Jackson, Mississippi 39211-6391
Post Office Box 16114
Jackson, Mississippi 39236-6114
Telephone: 601-352-2300
Email: freidmag@phelps.com
marshj@phelps.com
clarkt@phelps.com

**COUNSEL FOR CITY OF FLOWOOD,
MISSISSIPPI**

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the Brief of Appellee has been filed with the Clerk of the Court using the MEC system which sent notification of such filing to the following:

Louis H. Watson, Jr.
Nick Norris
WATSON & NORRIS PLLC
1880 Lakeland Drive, Suite G
Jackson, MS 39216
louis@watsonnorris.com
nick@watsonnorris.com

VIA U.S. MAIL:

Honorable John H. Emfinger
Rankin County Circuit Court
P.O. Box 1689
Brandon, MS 39403

This the 28th day of September, 2015.

/s/ H. David Clark, III
H. DAVID CLARK, III